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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 885.

ADELAIDE M. BRAUER and PRESTON HOWARD,
Petitioners,

vs.

CITY OF CLEVELAND,
Respondent.

RESPONDENT'S BRIEF
In Opposition to Petition for Writ of Certiorari.

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STATEMENT OF FACTS.

BRAUER VS. CITY OF CLEVELAND
7 O. S. 2d 94 (1966).

The facts (in this case) are not in dispute. The case arose shortly after the adoption of a Housing Code by the City of Cleveland as part of its Codified Ordinances. The Housing Code required that all multi-family dwellings used for residential rental occupancy must be inspected, and certified fit for human habitation, and that the cost of the inspection be borne by the property owner in the payment of a fee for a "Certificate of Occupancy." It was determined by the City of Cleveland that a row house, that is, several attached houses within one building, was within the meaning and the definition of the Housing Code (a multiple dwelling); and the City of Cleveland required further that before a row house could be occupied for rental purposes, they be inspected and certified.

The petitioner contended that elsewhere in the Codified Ordinances of the City of Cleveland for purposes not

of the Housing Code, row houses were described as being separate and distinct from multiple-dwellings, and, therefore her row house was not a multiple dwelling, and she filed suit to prevent the City from enforcing its ordinances as contained in the Housing Code.

The City demurred to petitioner's petition on several grounds, one being that this lawsuit was not the proper subject of a taxpayer's suit, and that it was to the benefit only of a small special interest group. The demurrer was sustained in the lower court, and the petitioner appealed. On appeal the Court of Appeals of Cuyahoga County reversed the lower court and sent it back to be heard on the merits. This was not such a final order from which the City could appeal.

In the trial on the merits the lower court held that row houses were within the meaning of, and for purposes of interpreting the Housing Code were multiple-dwellings, and entered judgment for the City of Cleveland. This ruling was then appealed to the Court of Appeals of Cuyahoga County and reversed, final judgment being entered for the petitioners. The Court reasoned that the sections of the various Codes must be read in pari materia, and where one section defines row houses and another does not, the written definition must stand. At this juncture in time, and the pressing need of the public to be protected by virtue of these very important inspections, the City did not raise further appeal. Rather, the City went back to Council, and Council changed the provision of the Housing Code, requiring specifically that row houses be inspected and certified before they may be occupied for rental purposes.

As a result of final judgment being rendered in her favor, petitioner applied to the trial court for an allowance of attorney fees in the amount of $9,690.00, to which

Respondents objected. Briefs were submitted, and upon the briefs and oral arguments the trial court awarded, to the taxpayer as an allowance for attorney fees, the sum of $4,900.00, which order was journalized on March 24, 1965.

Thereafter Respondent filed a notice of appeal from such order allowing attorney fees. The appeal was heard by the Court of Appeals, Eighth Judicial District, Cuyahoga County, and the Court of Appeals affirmed the judgment of the trial court, said order being journalized on December 1, 1965.

Respondent filed its Notice of Appeal on the 14th day of December, 1965, in the Court of Appeals on questions of law, and the Supreme Court on February 2, 1966, allowed a motion to certify the record.

The Supreme Court of Ohio, after the submission of briefs, oral arguments, and a complete review of the applicable Ohio Statutes and law overruled the Court of Appeals and reversed the decision of the trial court, entering final judgment in favor of the respondents herein. The petitioners' Motion for Rehearing in the Supreme Court of Ohio, for the first time, attempted to raise the so-called Federal questions by virtue of which they are attempting to invoke the jurisdiction of this Court. The Motion was overruled without opinion by the Supreme Court of Ohio.

PRESTON HOWARD, ET AL. VS. CITY OF CLEVELAND.

This cause of action originally arose as a taxpayers suit filed by the petitioner to restrain the City of Cleveland, respondent, from attempting to enforce the penalty provisions of Ordinance No. 2428-58, known as Section 13.0722 of The Codified Ordinances of the City of Cleveland on the grounds that the provisions of said Ordinance were illegal and unconstitutional. The Ordinance in ques-

tion imposes a 15% monetary penalty, which was added to the cost of making sidewalk repairs by the City and which was assessed against property owners in those instances where the property owners failed to repair their sidewalks after receiving due notice from the City to do so in accordance with the provisions of the Charter of the City of Cleveland.

Upon trial of this cause, the lower court ruled that the assessment of a 15% penalty based upon Section 13.0722 of The Codified Ordinances of the City of Cleveland was invalid and illegal and the levying of the assessment of such penalty against property owners was permanently enjoined.

The petitioners having prevailed upon the merits of their lawsuit, thereupon filed an application for an allowance of attorney fees with the lower court. Upon consideration of this application for attorney fees, the lower court ruled that attorney fees for the successful prosecution of the case upon its merits should be allowed and ordered the respondents to pay as additional costs the sum of $3880.00 as and for attorney fees to petitioners' attorneys, DuLaurence and DuLaurence and Van Aken, Whiting, Arnold, Bond and Withers.

The City of Cleveland prosecuted to the Court of Appeals an appeal from the order of the Court of Common Pleas, which awarded attorney fees in the amount of $3880.00 to the taxpayers' attorneys upon the grounds that such order of court was an abuse of discretion. It should be carefully noted that the judgment of the Court of Common Pleas as to the merits of the taxpayers' lawsuit was *not* appealed to the Court of Appeals but that the only issue which was appealed was the order of the Common Pleas Court made in respect to petitioners' application for attorney fees. The Court of Appeals of Cuyahoga County

sustained the order of the Common Pleas Court awarding attorney fees to petitioners' attorneys. Thereafter, the City of Cleveland filed its Motion to Certify the ruling to the Supreme Court of the State of Ohio and said Motion was not allowed.

The petitioners filed a second application for the allowance of *additional attorney fees* with the Court of Common Pleas for their services rendered in the Appellate Court proceedings and in the Supreme Court proceedings. On consideration of the second application for attorney fees and the briefs and arguments of counsel, the lower court on the 17th day of May, 1965, ruled that *additional attorney fees* should be allowed and ordered the City of Cleveland to pay, as additional costs, the sum of $1500.00 as and for attorney fees to petitioners' attorneys. The City of Cleveland prosecuted to the Court of Appeals an appeal from the order of the Court of Common Pleas, which awarded additional attorney fees in the sum of $1500.00 to the taxpayer's attorneys upon the grounds that such order of Court was an abuse of discretion and that there was no provision in law authorizing such an award of additional attorney fees. The appeal was heard by the Court of Appeals, Eighth Judicial District, Cuyahoga County, and on the 21st day of February, 1966, the Court of Appeals affirmed the judgment of the Trial Court. Respondent filed its Notice of Appeal on the 11th day of March, 1966, in the Court of Appeals on Questions of Law and perfected its appeal to the Supreme Court of Ohio.

Following its precedent in the *Brauer* case *supra*, the Supreme Court of Ohio reviewed the applicable Ohio Statutes, law, briefs and arguments, and rendered final judgment in favor of the respondent herein. A similar attempt to create Federal jurisdiction was made by the petitioner by way of Motion for rehearing, which was denied without opinion.

ARGUMENT.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION ON A WRIT OF CERTIORARI TO REVIEW HOLDINGS OF THE SUPREME COURT OF OHIO WHICH CONCERN MATTERS OF STATE LAW.

The petitioners' claim, at best, amounts to an assertion that the Supreme Court of Ohio erroneously interpreted Sections of the Revised Code of the State of Ohio. They argue that the Supreme Court, by virtue of this interpretation, deprives them of various of their constitutional rights. Their allegations can only be interpreted as concluding that the Supreme Court of Ohio erroneously interpreted a *state* statute for allowance of attorney fees.

This Court has firmly established that a mere erroneous decision given by a state court in the regular course of its judicial procedure does not deprive the unsuccessful party of property without due process of law. *American Railway Express Co. vs. Kentucky*, 273 U. S. 269 (1927), *Neblett, et al. vs. Carpenter, Insurance Commission, et al.*, 305 U. S. 297 (1938).

MATTERS OF LOCAL LAW ARE NOT RE-EXAMINABLE BY THE FEDERAL SUPREME COURT.

The petitioners complain, in one instance, that the Ohio Supreme Court on a Motion filed for the sole purpose of accepting jurisdiction, reversed the judgment of the Trial Court and the Court of Appeals, without hearing the case on its merits.

Whether the Supreme Court of Ohio did or did not follow its own rules of practice, is not a matter with which this Court can or should be concerned. The Supreme Court of the United States has consistently held that it

will not sit to determine whether local rules of practice have been followed, such inquiry being solely a question of State law with which this Court is not concerned. *Louisville & Nashville R. R. Co. vs. Holloway,* 246 U. S. 525 (1918).

THE SUPREME COURT OF OHIO RESTED ITS DECISION ON NON-FEDERAL GROUNDS.

A writ of certiorari from the Supreme Court of the United States to the Supreme Court of a state, can be sustained only when the decision of that state court is against a right specifically protected under the Constitution and laws of the United States.

If the decision of the State Court rests upon independent legal grounds not involving a Federal question, the Supreme Court has no jurisdiction and will not entertain a Motion for a Writ of Certiorari. *Keen vs. Keen,* 201 U. S. 319 (1906); *Elder vs. Colorado,* 204 U. S. 85 (1907); *Campbell vs. Olney,* 262 U. S. 352 (1923); *Louisville and Nashville R. R. Co. vs. Holloway, supra.*

A careful reading of the decisions by the Ohio Supreme Court in the *Brauer* and *Preston Howard* cases (see: Petitioners' Appendices A, C and D) disclose that the State Court concerned itself solely with the interpretation and application of State Statutes involved in the litigation. The Ohio Supreme Court clarified the confusion that had existed regarding attorney fees in taxpayer's actions, a matter solely of local law. As has been indicated this Court has held repeatedly that decisions of a State Court based solely on matters of local law and not involving constitutional questions, are not reviewable. See: *Palmer vs. Ohio,* 248 U. S. 32 (1918); *The Winnebago,* 205 U. S. 354 (1907); *Hibben vs. Smith,* 191 U. S. 310 (1903).

The Supreme Court of Ohio, being Ohio's highest court, is the final and sole interpreter of matters of state practice and procedure. The petitioners are asking this Court to review and interpret the decision of a State Court in a purely local matter.

Cutting through the maze of legal argument propounded by the petitioners, it is patently clear that the Supreme Court of Ohio's decision rested solely on an interpretation of Section 733.61 of the Revised Code of Ohio, and this Court has no jurisdiction to review same. *Stewart v. Kansas City,* 239 U. S. 14 (1915); *Dänciger vs. Cooley,* 248 U. S. 319 (1919).

THE DECISIONS BELOW DO NOT INVOLVE PRINCIPLES OF FAR REACHING IMPORTANCE.

The Federal Supreme Court, being a court of limited jurisdiction, will entertain and allow Writs of Certiorari where the legal issues are such as have full and far reaching effect or impact on all the states. However, by the very nature of this tribunal, it will only pass on those cases that involve important constitutional principles, or are of far reaching importance. *United States vs. Rimer,* 220 U. S. 547 (1911).

The decisions of the Ohio Supreme Court involve at most an alleged mis-interpretation of state statutes, and have no importance nor significance outside the boundaries of the State of Ohio. As a matter of fact, the decisions even in Ohio are applicable only in the limited area of taxpayers action against Municipal Corporations.

CONCLUSION.

Since there are no grounds which would be productive for the granting of the Petition for a Writ of Certiorari, the respondent respectfully submits that this Court should refuse jurisdiction of same.

Respectfully submitted,

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